AMERICAN BAR ASSOCIATION SECTION OF INTERNATIONAL LAW WINTER 2008, VOL. I, ISSUE NO. I

Art & Cultural Heritage Law Newsletter

A Publication of the Art & Cultural Heritage Law Committee

IMMUNITY FROM SEIZURE BECOMES LAW IN THE UNITED KINGDOM

By Gregor Kleinknecht and Anna O'Connell, Klein Solicitors, London, England

Criticised by claimants' representatives for "protecting the thief" but welcomed by British museums, which faced increasing reluctance by foreign lenders to commit important art works for major exhibitions, the United Kingdom Parliament enacted anti-seizure legislation which received Royal Assent on 19 July 2007. Its aim is to provide immunity from seizure to art loans and to enhance the cross-border mobility of art for temporary non-profit exhibition in the United Kingdom.

The relevant legal provisions are set out in Sections 134 to 138 in Part 6 (Protection of Cultural Objects on Loan) of the Tribunals, Courts and Enforcement Act 2007 ("the Act") and are expected to come into force during the first half of 2008. This delay is intended to enable implementing regulations under the Act to be brought in. The Protection of Cultural Objects (Publication and Provision of Information) Regulations 2007 have been published in draft form ("the Draft Regulations"), and the public consultation period on the Draft Regulations closes on 21 December 2007. But will the Act provide museums with the effective protection which they have been hoping for? Or will they simply replace one set of problems with another set of problems? Will claimants be deprived of effective legal rights and remedies? And can ethical standards be maintained?

International Comparison

A number of countries internationally have implemented anti-seizure legislation, including the United States (at federal level and in some states, including New York and Texas), as well as France, Germany, Belgium, Austria, Switzerland and Israel. Not surprisingly, all of the above are countries which have a tradition of hosting major exhibitions and for which the legal security of international art loans has become a central issue. Such legislation broadly adopts one of two fundamental approaches: it either grants automatic protection or requires advance application to and assessment by a governmental body. [*cont'd at* **UK IMMUNITY**, *page 17*]

Welcome to our Inaugural Issue!

On behalf of the Art & Cultural Heritage Law Committee, we welcome you to the inaugural issue of our biannual newsletter. Our aim is to inform art and cultural heritage law enthusiasts about recent developments in the field, to provide a forum for discussion of related issues, and to provide opportunities for interested persons to get involved. We hope you enjoy!

Cristian DeFrancia & Lucille A. Roussin
Co-Chairs

Bonnie Czegledi

The articles contained in this Newsletter have been printed without footnotes. To obtain individual versions of these articles with footnotes, please contact cdefrancia@mac.com.

BEHIND ITALY'S RECENT SUCCESSES IN CULTURAL PATRIMONY RECOVERY

By Jennifer Anglim Kreder, Chase College of Law, Northern Kentucky University

Popular press lately attributes Italy's recent success reclaiming its cultural patrimony to the book *Medici Conspiracy* by Peter Watson and Cecilia Todeschini. Although the book is interesting and revealing, the truth is that Italy's recent successes have resulted from events dating back to 1902 when it passed its first "in-the-ground" statute, which vests ownership of unearthed ancient artifacts in the state. Italy ratified the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property in 1978. In 2001, Italy signed a Memorandum of Understanding (MOU) with the United States, also a party to the UNESCO Convention. Pursuant to the MOU, which was renewed in 2006, the United States agreed to protect pre-Classical, Classical and Imperial Roman architectural material. Thus, U.S. customs and enforcement agents have been committed to the goal of recovering covered artifacts. Italy, however, has not sat back and waited for the United States to do the heavy lifting.

In the mid-1990s, Italy began to firmly press U.S. museums to return objects Italy believed had been illegally exported. It has long been understood that artifacts illegally excavated in Italy are transported through Switzerland before reaching the international market. Accordingly, Italian police sought assistance from Swiss police in 1995 to conduct raids on the Geneva warehouses of Italian art dealer Giacomo Medici. As relayed in the Medici Conspiracy, the raid uncovered a vast treasure trove of smuggled antiquities – many fresh from the ground and others in various stages of the market preparation process. A parallel investigation in Italy uncovered a piece of paper that seems to reflect an organization/flow chart of a vast smuggling ring implicating key players in the international antiquities market, including a number of U.S. museums, former J. Paul Getty Museum (the Getty) curator Marion True and prominent art dealer Robert Hecht. The author of the chart, however, was dead by the time it was found. The chart alone cannot tell us about the knowledge possessed by these key players about the provenience of antiquities they purchased. Nonetheless, the Italian government viewed the chart in conjunction with other evidence, particularly photographs found at the Medici warehouses, and brought criminal charges against key and lesser players.

Medici was arrested in 1997 and convicted in 2004 after a lengthy trial in Rome with testimony by Italian tomboroli, "tomb raiders." Medici was sentenced to ten years in jail and fined € 10 million. He remains free pending his appeal. Hecht and True were indicted in 2002 for conspiracy to traffic in antiquities. Hecht was (in)famous for having sold the Euphronios krater to the Metropolitan Museum of Art for a controversial $1 million in 1972, the first million-dollar sale of a piece of antiquity. True, who had tightened the Getty's questionable acquisition policies during her tenure as curator there, was the first U.S. museum employee ever to be indicted for allegedly illegal antiquities trading.

Negotiations between the Italians and the Getty were difficult – it took several years before they could agree on exactly which antiquities the Getty would return to Italy. Additionally, it was reported in the press that the Getty tried to condition the return upon the dropping of charges against True and that the Italians refused this request. On October 25, 2007, the Getty formally agreed to return 40 of the 51 artifacts demanded, including the prized Cult Goddess limestone and marble statue. [*cont'd at* **ITALY'S CULTURAL PATRIMONY**, *page 23*]

PERUVIAN ANTIQUITIES TRAFFICKER JAILED FOLLOWING COUNTY AND FEDERAL INVESTIGATION IN FLORIDA

By Ricardo A. St. Hilaire, Grafton County Attorney, State of New Hampshire

Transnational antiquities trafficking is not often prosecuted in the United States. That is why the conviction of Ugo Bagnato this spring in a federal district court is noteworthy. Bagnato served 17 months in prison after police connected him to over $1 million of illegally smuggled ancient Peruvian artifacts.

The 66 year old Italian national, who sold pre-Columbian objects in Florida from a van, became the target of an undercover investigation by U.S. Immigration and Customs Enforcement (ICE) and the Broward Sheriff's Office (BSO) after an informant contacted authorities. In September 2005, police executed three search warrants at locations in southern Florida, seizing hundreds of stolen pre-Columbian items.

3500 year old clay vessel repatriated to Peru. Photo Courtesy of ICE

Bagnato reportedly smuggled artifacts into the United States using false documents. He offered for sale a 3500 year old clay pot and an 1800 year old statue to an undercover agent at the discounted price of $2,000 each—the pot alone was valued at $20,000. A grand jury indicted Bagnato, who ultimately pled guilty to one count of receiving and selling stolen property. United States Attorney R. Alexander Acosta's office in southern Florida prosecuted the criminal case.

Authorities stressed that cooperation between law enforcement officers and the desire to protect cultural heritage helped crack the antiquities trafficking scheme. "It would be like someone stealing the Declaration of Independence," explained Broward Sheriff Ken Jenne. U.S. Attorney Acosta conceded that the choice to prosecute antiquities crime is challenging when balanced against the finite resources of his office, but reasoned: "No one should seek to profit from antiquities that are part of our world's history and can never be replaced."

Following Bagnato's conviction, officials transferred the recovered antiquities to Peru. The return of more than 400 objects on June 13, 2007 was the largest repatriation of cultural property to the South American nation since the United States and Peru in 1997 adopted a bilateral agreement to protect cultural property. The agreement, known as a Memorandum of Understanding (MOU), authorized American import controls on archaeological and ethnological resources originating from Peru. The countries signed the MOU pursuant to the terms of the Cultural Property Implementation Act, the federal law enacting the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The governments of the United States and Peru renewed the MOU in 2002 and again in 2007.

Dr. Carol Damian of Florida International University and Dr. Ramiro Matos of the Smithsonian Institution identified the objects returned to Peru. They primarily came from ancient graves and included clay **[over]**

ICE agent inspects seized pre-Columbian artifacts. Photo Courtesy of ICE

Pre-Columbian pot recovered by ICE and BSO. Photo Courtesy of ICE

[*from previous page*] vessels, a feathered royal cape, child's tunic, bone snuff holder, silver masks, counting machines known as *quipus*, gold jewelry, burial shrouds, dolls, and tapestries. "These artifacts are not souvenirs. The items being returned . . . are a thread of a nation rich in cultural heritage," observed Assistant Secretary Julie Myers of the Department of Homeland Security. Prior to the arrival of Europeans in South America, Peru was home to such notable cultures as the Inca Empire and the Moche civilization.

More information about American import controls placed on Peruvian cultural property can be found on the U.S. State Department's website at http://exchanges.state.gov/culprop/pefact.html.

The Art & Cultural Heritage Law Committee invites you to attend our program at the Spring 2008 Meeting of the ABA International Law Section in New York, co-sponsored by the Lawyers Committee for Cultural Heritage Preservation

Legal and Ethical Problems in Art Restitution

New York – Grand Hyatt

April 4, 2008 – 4:00 p.m. – 5:15 p.m.

Program Overview:

This roundtable will explore legal and ethical issues implicated by claims for restitution of art. Litigation of such claims concerning antiquities and Nazi-looted art is on the rise, which may indicate a decreasing willingness for compromise in this area with little black letter law. Practitioners will discuss the defense, claimant and auction house perspectives while academics analyze recent trends. The focus is settlement and resolution emphasizing how legal defenses, such as statutes of limitation, and moral issues should be rectified with the interests of particular clients and the requirements of ethics codes.

Panelists:

Monica S. Dugot, ***Senior Vice President, Director of Restitution, Christie's***
Thomas R. Kline, ***Partner, Andrews Kurth, LLP (D.C. Office)***
Jennifer Anglim Kreder, ***Associate Professor, Chase College of Law, Northern Kentucky University***
Lucille A. Roussin, ***Founder and Director of the Holocaust Restitution Claims Practicum, Benjamin N. Cardozo School of Law***

For additional information, e-mail krederj1@nku.edu.

CANADIAN CULTURAL PROPERTY EXPORT AND IMPORT ACT REVIEWED FOR THE FIRST TIME IN THIRTY YEARS

Why Canada Should Not Certify Unprovenanced Material for Purposes of Tax Deduction

By Bonnie Czegledi, Barrister & Solicitor, International Art & Cultural Heritage Law, Toronto, Canada

As Canada is a signatory to the 1970 *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* and brought into force in 1977 the Cultural Property Export and Import Act as the enabling legislation to fulfill its commitment to this Convention under Canadian domestic law, it seems unfathomable that our government should certify unprovenanced material for the purposes of tax deductions. Indeed the citizens of Canada have rights and obligations pursuant to this Convention to refuse to participate in such illicit activities.There is nothing particularly progressive or pioneering about this position; it is simply a question of keeping in step with many other nations whose values and position as ethical world leaders are similar to Canada's.

The time has now come for Canada to join the ranks of other Western nations in taking a stance on acquisition of unprovenanced material in public institutions and the relating tax practices in terms of deductions to donors of unprovenanced material.

Ethical examples of modern practices in the Western world and spirit of collection and exhibiting in accordance to law are as follows:

London, UK: National museums refuse to lend to exhibitions material that may have been looted or illegally exported (see "British Museums adopt tougher stance on unprovenanced antiquities' The Art Newspaper,No.183, September 2007, p.16, attached).

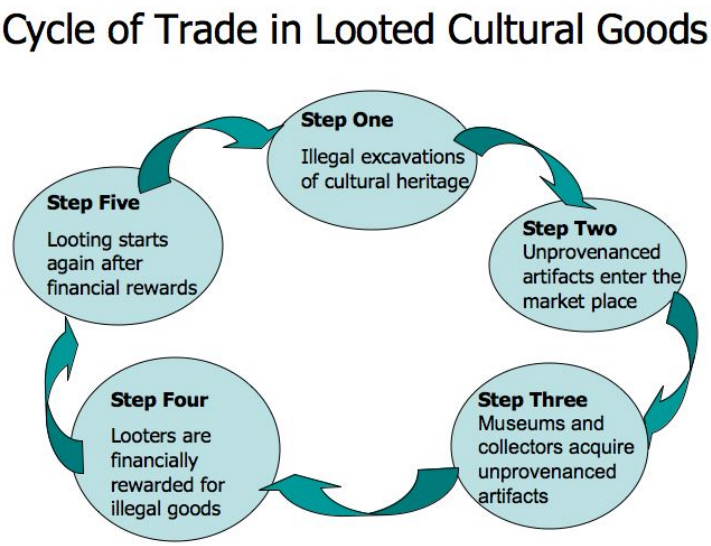
Los Angeles, USA: Acquisition Policy of the J. Paul Getty Museum

Conditions of acquisition (according to this acquisition policy):

- No object will be acquired without assurance that valid and legal title can be transferred.
- The Museum will undertake due diligence to establish the legal status of an object under consideration for acquisitions, making every reasonable effort to investigate, substantiate, or clarify the provenance of the object.

No object will be acquired that, to the knowledge of the Museum, has been stolen, removed in contravention of treaties and international conventions of which the United States is a signatory, illegally exported from its country of origin or the country where it was last legally owned, or illegally imported into the United States.

In addition the UK *Due Diligence* **[*over*]**



[CANADA, *from previous page*] *Guidelines for Museums, Libraries and Archives on Collecting and Borrowing Cultural Material* published by the Department for Culture, Media and Sport, Cultural Property Unit states:

'Museums should acquire and borrow items only if they are legally and ethically sound. They should reject an item if there is any suspicion about it, or about the circumstances surrounding it, after undertaking due diligence. Documentary evidence, or if that is unavailable an affidavit, is necessary to prove the ethical status of a major item. Museums should acquire or borrow items only if they are certain they have not been illegally excavated or illegally exported ....'

In Canada, as a nation that purports to lead in matters of law and fairness, the onus should be on the collector to prove title when asking for a certification for the purposes of a tax deduction. Without clear provenance, an object should never be considered for certification by the Canadian Government.

On a positive note, we are beginning to see the tide of change. Following the lead of admirable collections in the United States and Europe, reputable collectors in this country are, for the first time, seeking to protect the integrity of their collections by doing careful due diligence both in acquiring works of art and in donating and loaning them. This government must be seen as being part of the movement forward.

After reviewing practices of other nations, the question arises: how could Canada, under any circumstances, consider certifying material that, in other nations of the civilized world, would be deemed illicit? The current system, which allows acceptance and certifying unprovenanced material, in fact contributes to the criminal cycle of illicit trafficking of cultural property, because collectors can be rewarded with significant tax benefit for owning what, in many other nations, would be considered stolen goods.

Q&A *with Lawrence M. Kaye*

In each issue of the Committee's newsletter, we will conduct a Question & Answer with a prominent attorney in the field of art & cultural heritage law. We are pleased to have Larry Kaye of Herrick, Feinstein LLP for our first issue. Among Larry's accomplishments, he is noted for his representation of foreign governments, victims of the Holocaust, families of renowned artists and other claimants in connection with the recovery of art and antiquities. He was a lead attorney in the landmark case of Federal Republic of Germany v. Elicofon, in which two early masterpieces by Albrecht Durer, stolen at the end of the Second World War, were recovered and returned to the Weimar Art Museum; he represented the Republic of Turkey in its successful efforts to recover the fabled Lydian Hoard antiquities, long held by the Metropolitan Museum of Art, and some 1800 ancient Greek and Lydian coins which Connoisseur Magazine called "The Hoard of the Century"; and successfully represented the heirs of the Russian artist, Kazimir Severinovich Malevich, in connection with their claims against New York's Museum of Modern Art.

We understand you started working on an art law matter as a law student and wound up arguing the same case as a senior partner. Would you tell us about this case and how that launched your career in art law?

During the summer of 1969, I was a St. John's Law student employed as a summer associate by Botein, Hays and Sklar. During the course of the summer, the gentleman who turned out to be my mentor and then colleague and partner for more than 30 years, asked me to research an issue in a case involving the efforts of the Weimar Art Museum to recover Durer paintings that were stolen during World War II. I completed the research, returned to the firm the next year to work as a permanent associate and ended up working on that extraordinary and seminal art law case for more than 15 years. The two works were returned to the Weimer Art Museum after our victory in the litigation in 1993. Harry Rand and I and others then went on to forge a career heavily immersed in international art law litigation and other matters.

You represented the Republic of Turkey in the restitution of the Lydian Hoard, and now some of the best pieces are missing from the Usak Museum. Does this in any way change your mind about the restitution of antiquities to the country of origin?

Thefts and other losses from museums is not a new problem and it will not go away, as most notably shown by what recently occurred in Norway when the Munchs were stolen. Other museums, great and not so great, have suffered as well. But when losses occur in museums in poorer countries people rush to judgment to say that it is an example of how poorly they maintain their antiquities. The Lydian Hoard was treated with the greatest respect by Turkey and the Turkish people. They came out in droves to see their treasures once they were returned. In fact, only one piece from the Lydian Hoard was

Q&A with Lawrence M. Kaye

stolen, and those responsible, including the Director of the museum, were quickly caught and appropriately punished. It is important to note that the practically universal outrage expressed by the Turkish people about the theft once again demonstrated how important these cultural treasures are to all of the Turkish people who are quite sensitive to the importance of these treasures to their history and national identity. This is why Turkey is a leader among those nations who have sought zealously to recover their looted cultural heritage.

What new archives or other sources are being researched to determine the existence of previously unearthed Nazi-looted art claims?

Especially after the Washington Conference in 1998, many previously closed archives throughout the world were opened to researchers. Many documents were unsealed in US archives and those of other countries. The internet has turned out to be an extraordinary source of new information. Museums, universities and other institutions have been releasing more information as time goes on.

How is the current black market in forged artworks affecting claims to return cultural property to rightful owners?

Forgeries have always been a problem. Obviously,when artwork is claimed and returned, one must establish authenticity and identity, particularly when the artwork is purportedly by an artist who has often been forged. Each case varies from the next.

Are most museums and individuals receptive to reaching a compromise in response to receiving a claim or do they usually take a defensive position?

I believe museums and other institutions and private collectors are much more sensitive to the issue of stolen cultural property then they were years ago. So often serious claims are met with more serious responses. But there are still examples of institutions and collectors trying to avoid responsibility, raising technical defenses and other impediments to the recovery of stolen art.

What is the status of the Egon Schiele Portrait of Wally civil forfeiture litigation in New York?

Discovery is virtually complete and summary judgment motions have been scheduled. Hopefully, judgment will be rendered in 2008.

What advice would you have for a young lawyer interested in working in the cultural heritage field?

My advice to young lawyers interested in working in the cultural heritage field is simply to become the best lawyer they can. Opportunities are growing in the field. When I started almost 40 years ago, I believe we were the only game in town. Happily, the field has grown and there are many more opportunities for good lawyers interested in the field.

RECENT JUDICIAL DECISIONS IN NAZI-ERA LOOTED ART CASES

By Lucille A. Roussin, Adjunct Professor, Benjamin N. Cardozo School of Law, New York

It is now internationally acknowledged that vast quantities of artworks were looted during World War II, not randomly, but as official policy of the Nazi government. Any estimate of the numbers of stolen artworks must remain speculative, however, some estimates put the figure at 600,000 works of painting, sculpture and tapestries, of which anywhere from 10,000 to 100,000 works are still missing.

The popular interest in the fate of the art looted during the War is due, at least in part, to the current market value of high quality art. But it must be borne in mind that during and immediately after World War II artworks – even of the best quality – were not very expensive. As Gerald Reitlinger has noted: "The market remained rationed until at least 1951. In the previous years heavy price rises could only be sustained by purely native or resident buyers in such protected areas as the U.S.A. In the early fifties it was still said that the cheapest thing you could buy was a work of art. . . .Nor were the prices of the later fifties, particularly the prices of nineteenth and twentieth century French art, altogether the 'coup de foudre' which the popular Press made them to be." The dramatic escalation of prices of art began in the 1960's, reached a peak in the late 1980's and then declined, but has again escalated to remarkable sums.

Although many claimants in the U.S., either in court or through settlements, have been successful in their efforts to gain restitution for artworks lost through confiscation or forced sales, there are some U.S. court decisions that have denied claims on various legal grounds. Most recently in an unusual twist to art restitution claims involving art sold during the Nazi-era, the Toledo Museum of Art bought an action to quiet title against the claimants, the heirs of Martha Nathan, a collector from Frankfurt. The work of art at issue is Gaugin's "Street in Tahiti" painted in 1891, said to be worth between $10 and $15 million, which the Toledo Museum acquired in 1939 for $25,000. Both parties sought declaratory relief, and the heirs also brought substantive claims for restitution and conversion. Another painting, "The Diggers," by Van Gogh, in the Detroit Institute of Arts is the subject of another claim by the Nathan heirs, but no decision has been issued.

Martha Nathan was the widow of prominent art collector, Hugo Nathan, of Frankfurt, Germany, who died in 1922. With the rise of Nazi persecution of the Jews, she moved to Paris in 1937, where she obtained French citizenship. She returned to Germany to sell her house and sent some of her household goods to France. Although she was forced to surrender some works of art to the Nazi government, the Gaugin was not among the aryanized works. According to the provenance report issued jointly by the Toledo and Detroit Museums, Mrs. Nathan transferred her art collection, including the Gaugin, to Basel, Switzerland in 1930, three years before the Nazis came to power in Germany, where it remained until she sold it in 1938. In December 1938, Mrs. Nathan invited art dealer George Wildenstein to view the art in Basel, which resulted in the sale of the Gaugin and the van Gogh to a consortium of art dealers – Wildenstein, Galerie Thannhauser and Alex Ball – the van Gogh for 40,920 Swiss Francs ($ 9,364) and the Gaugin for 30,000 Swiss Francs ($6,865). The heirs dispute the legitimacy of the sales, citing the lack of any bill of sale or exchange of consideration, or, in the alternative, the unconscionability of purchase price.

The court rejected all these arguments, stating that "this sale occurred outside Germany by and between private individuals who were familiar with each other. The Painting was not confiscated or looted by the Nazis; the sale was not **[*over*]**

[NAZI LOOT, *from previous page*] It is now internationally acknowledged that vast quantities of artworks were looted during World War II, not randomly, but as official policy of the Nazi government. Any estimate of the numbers of stolen artworks must remain speculative, however, some estimates put the figure at 600,000 works of painting, sculpture and tapestries, of which anywhere from 10,000 to 100,000 works are still missing.

The popular interest in the fate of the art looted during the War is due, at least in part, to the current market value of high quality art. But it must be borne in mind that during and immediately after World War II artworks – even of the best quality – were not very expensive. As Gerald Reitlinger has noted: "The market remained rationed until at least 1951. In the previous years heavy price rises could only be sustained by purely native or resident buyers in such protected areas as the U.S.A. In the early fifties it was still said that the cheapest thing you could buy was a work of art. . . .Nor were the prices of the later fifties, particularly the prices of nineteenth and twentieth century French art, altogether the 'coup de foudre' which the popular Press made them to be." The dramatic escalation of prices of art began in the 1960's, reached a peak in the late 1980's and then declined, but has again escalated to remarkable sums.

Although many claimants in the U.S., either in court or through settlements, have been successful in their efforts to gain restitution for artworks lost through confiscation or forced sales, there are some U.S. court decisions that have denied claims on various legal grounds. Most recently in an unusual twist to art restitution claims involving art sold during the Nazi-era, the Toledo Museum of Art bought an action to quiet title against the claimants, the heirs of Martha Nathan, a collector from Frankfurt. The work of art at issue is Gaugin's "Street in Tahiti" painted in 1891, said to be worth between $10 and $15 million, which the Toledo Museum acquired in 1939 for $25,000. Both parties sought declaratory relief, and the heirs also brought substantive claims for restitution and conversion. Another painting, "The Diggers," by Van Gogh, in the Detroit Institute of Arts is the subject of another claim by the Nathan heirs, but no decision has been issued.

Martha Nathan was the widow of prominent art collector, Hugo Nathan, of Frankfurt, Germany, who died in 1922. With the rise of Nazi persecution of the Jews, she moved to Paris in 1937, where she obtained French citizenship. She returned to Germany to sell her house and sent some of her household goods to France. Although she was forced to surrender some works of art to the Nazi government, the Gaugin was not among the aryanized works. According to the provenance report issued jointly by the Toledo and Detroit Museums, Mrs. Nathan transferred her art collection, including the Gaugin, to Basel, Switzerland in 1930, three years before the Nazis came to power in Germany, where it remained until she sold it in 1938. In December 1938, Mrs. Nathan invited art dealer George Wildenstein to view the art in Basel, which resulted in the sale of the Gaugin and the van Gogh to a consortium of art dealers – Wildenstein, Galerie Thannhauser and Alex Ball – the van Gogh for 40,920 Swiss Francs ($ 9,364) and the Gaugin for 30,000 Swiss Francs ($6,865). The heirs dispute the legitimacy of the sales, citing the lack of any bill of sale or exchange of consideration, or, in the alternative, the unconscionability of purchase price.

The court rejected all these arguments, stating that "this sale occurred outside Germany by and between private individuals who were familiar with each other. The Painting was not confiscated or looted by the Nazis; the sale was not at the direction of, nor did the proceeds benefit, the Nazi regime." Moreover, the court cited Martha Nathan's efforts to seek restitution and/or reparations for her losses after the war. The court considered five points in its **[*over*]**

[NAZI LOOT, *from previous page*] determination for a declaratory judgment: (i) whether the judgment would settle the controversy; (ii) whether the declaratory judgment action would serve a useful purpose in clarifying the legal relations at issue; (iii) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or to "provide an arena for a race for res judicata;" (iv) whether the use of a declaratory action would increase the friction between our federal and state courts and improperly encroach on state jurisdiction; and (v) whether there is an alternative remedy that is better or more effective.

Having decided that all five factors were met, the court concluded that "because a declaratory judgment action is a procedural device used to vindicate substantive rights, it is time-barred only if relief on a direct claim would also be barred." The court then went on to consider the statute of limitations and the defendants lack of due diligence. Ohio uses the discovery rule; that is, when, with the exercise of reasonable care, the claimant should have discovered the whereabouts of his property. The fact that Martha Nathan pursued restitution and damages for property she lost due to Nazi persecution after the war, but never sought or filed claim for this painting, weighed heavily in favor of the Museum. The court did not go so far as to impute the claimants with Mrs. Nathan knowledge, but stated they should have made inquiry into the whereabouts of the painting well before their claim to the Museum. The defendants' reliance on the American Association of Museums Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era in their claim that the Museum had waived any statute of limitations and laches defense was rejected by the court. "The Guidelines were not intended to create legal obligations or mandatory rules but rather were intended to facilitate 'the ability of the museums to act ethically and legally as stewards' through 'serious efforts' on a 'case by case basis.' " The court thus granted the Plaintiffs Motion to Dismiss.

Another decision made by the Supreme Court of New York in September, 2006 similarly found that the heirs sat on their rights and thereby lost ownership of a painting by Edvard Munch, "Strasse in Kragero." In this case, the painting had been owned by Professor Curt Glaser, who had been a director of the State Museum in Berlin. He left it with his brother when he and his second wife, Maria Glaser, fled to Switzerland due to Nazi persecution. The brother, an art dealer, sold the painting without his knowledge. The painting has a rather complicated history. It was acquired by steel magnate Albert Otten some time after 1933, and in 1936 Professor Glaser offered to buy it back from him. However, in 1937 Otten, too, fled the Nazis and settled in the New Jersey. Professor Glaser died in Lake Placid, New York on November 23, 1943, at which time his property passed to his wife. The Otten family consigned the painting to Sotheby's in 2002, where it was sold for $1.5 million.

The petitioner in this case was the Executrix of Maria Glaser's estate. This action was brought against Sotheby's to force them to reveal the name of the purchaser. The lower court found that the papers adequately framed a meritorious cause of action for wrongful detention of the painting and ordered Sotheby's to reveal the name of the purchase. This court, however, did not consider the issues of laches and the statute of limitations, upon which the Appellate Court based its decision.

On appeal, the court parsed the New York rule governing an action to recover converted property purchased in good faith, which is the Demand and Refusal Rule. Under this New York rule, the action accrues only three years after the refusal of a demand for its return. Moreover, under the New York rule there is no requirement of due diligence. The Appellate Court thus found that the statute of limitations began to run when the Professor demanded the return **[*over*]**

[NAZI LOOT, *from previous page*] of the painting, and therefore expired 70 years ago.

More significant is that the court here found that the pre-action demand for discovery was barred by the doctrine of laches, usually considered an issue of fact to be decided at trial. Here, the court found that neither Professor Glaser nor his widow made any post war claim for the painting from the German government and no one in the Glaser family ever made any attempt to recover the painting even though it was exhibited as part of the Otten family collection in prominent museums and galleries. Thus, the court stated, "where the original owner's lack of due diligence and prejudice to the party currently in possession are apparent, the issue may be resolved as a matter of law." Accordingly, the order of the Supreme Court granting pre-action discovery was dismissed, the action that directed Sotheby's to reveal the name of the purchaser was reversed, the order vacated and the application denied and the petition dismissed.

This decision and the subsequent decision in the Toledo Museum of Art case set a high standard for families seeking to recover artworks to prove that they diligently sought to recover the artworks from the time they were aware of their whereabouts.

Another claim to a rare illuminated manuscript was recently rejected by the Supreme Court of New York on the grounds of a French law that set a limitations period of December 31, 1947 and provisions of the French Civil Code barring claims after the possessor, even a bad faith possessor, has had peaceful, continuous and open possession for the statutory period of 30 years. The court based its decision on the very narrow definition of the word "buyer" because the manuscript was not bought by the defendant, but rather restituted to the defendant, however erroneously.

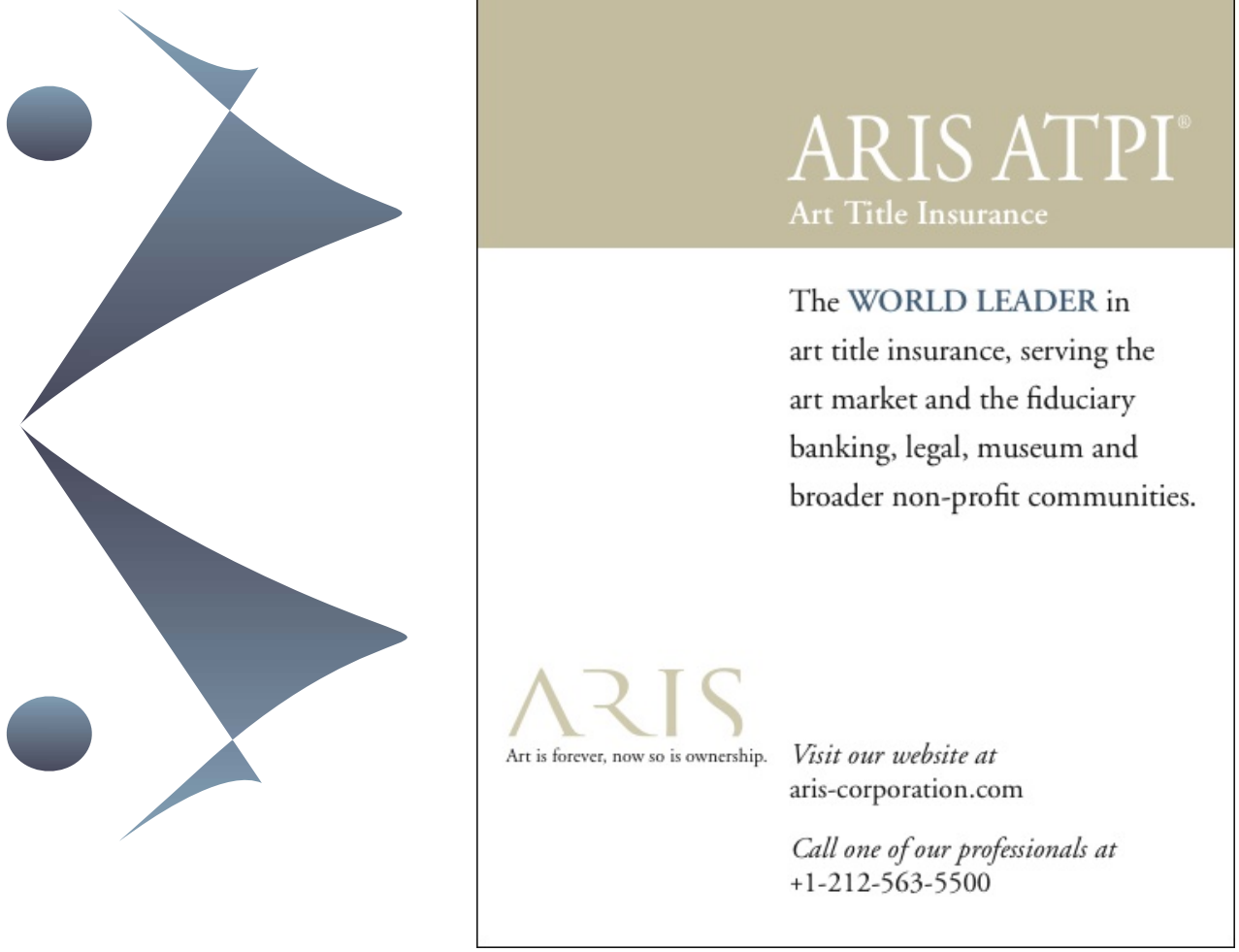
These decisions denying restitution of works of art to the original owners or their heirs are complex and problematic. A limitations period of 1947, as established in the French law, or that of December 31, 1948 as required by the Jewish Restitution Survivor Organization and Jewish Cultural Reconstruction was unrealistic – hundreds of thousands of people who had owned valuable property were still in displaced persons camps and certainly not concerned with their property. Even those who, like Martha Nathan, were able to find refuge in neutral countries often had to sell their property because their bank accounts in Germany were blocked. Under the terms of the Declaration of London, the Allies and a number of other nations reserved their rights "to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the Governments with which they are at war, or which belong, or have belonged, to persons resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder or of transactions apparently legal in form, even when they purport to be voluntarily effected." The tenets of this Declaration were enforced in the U.S. zone of occupation in Germany through the enactment of Military Government Law 59, which not only reiterated the presumption of confiscation, but also put the burden of proof upon the possessor of the property rather than on the claimant.

It is questionable if there should even be a statute of limitations in cases involving looted art. Under the Charter of the International Military Tribunal of Nuremberg the plunder of public or private property is a war crime. Those responsible for the looting of art objects – most notoriously Alfred Rosenberg – were prosecuted as war criminals at the Nuremberg trials. Under international law, there are no statutes of limitation with respect to war crimes and other violations of international law, **[*over*]**

[NAZI LOOT, *from previous page*] excluding the Torture Victim Protection Act, 28 U.S.C.S. § 1350. The principle of non-applicability of statutory limitations to certain violations of international law has been recognized in international instruments. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity provides that no statutory limitations period shall apply to war crimes and crimes against humanity. Although the U.S. is not a signatory to the Convention, at least one Federal judge has recently said that this Convention should be recognized as part of customary international law.

As customary international law, this principle should apply equally to civil actions. The policy behind the treatment of the plunder or any forced transfer of cultural property – even when seemingly voluntary – "impels the conclusion that the Statute of Limitations should be inapplicable in civil cases brought to recover property originally plundered during war time, or at least that special rules should be adopted limiting its applicability in such cases." The application of this principle may not have changed the outcome of the Nathan case or other cases that may already be considered res judicata, but courts should consider at very least a relaxed standard for application of statutes of limitations and laches in cases involving property looted during WW II.

This article also appeared in Kunst und Recht, April - May, 2/2007



A PRIMER ON TITLE INSURANCE FOR ART

By Lawrence M. Shindell, Chairman and Chief Executive Officer of ARIS Corporation

With the increased recognition of art (artistic works and objects broadly defined) as an asset and the increasing prices for art in the international markets, it is natural for title insurance to have evolved as a means to manage art ownership risks. Title insurance for real property traditionally has brought transparency and liquidity to that industry. After all, certainty of legal ownership is the lynchpin to the ability to buy, sell, gift or otherwise use property efficiently.

Today's art world remains non-transparent, and the incidence of art title claims continues to rise. Art title claims occur generally because of (i) historical theft (e.g., WWII Nazi-Era claims or illegal export/import) or contemporary theft (e.g., Steven Spielberg's stolen Norman Rockwell painting), which together represent about twenty-five percent of the exposure; and (ii) lack of authority to sell (e.g., dealers not paying consignors, an issue which is now central to two major U.S. legal battles) or traditional liens or encumbrances, which together represent the other seventy-five percent. Because nearly one-third of art thefts are not reported to law enforcement authorities and three-quarters of art title claims arise for reasons beyond provenance (combining to limit the efficacy of the art industry's traditional stolen art databases), and because private indemnity between sellers and buyers (historically relied on to manage the art title risk for lack of any alternative) has severe limitations, clients unwittingly self-insure.

Title insurance is a true third-party risk transfer and is the only mechanism that can effectively manage title risks outside of self-insuring. (The latter option implies that a person is fully informed about the extent of the risk.) Art title insurance operates in the same way that real property title insurance operates: for a one-time premium at policy inception, it indemnifies against defective ownership for the named insured's life of ownership of the work and, automatically, for the life of ownership of the named insured's heirs at law (if the insured work is transferred to them at or before death versus to a third-party). Coverage carries no deductible. Defense costs are outside-the-limits, that is, are in addition to the indemnity covering the insured work.

Policy endorsements protect against the financial consequences to a donor and a qualified 501(c)(3) institution for charitable gifts later found to be void *ab initio* because the donor-taxpayer did not legally own the gifted work in the first instance. This is an important consideration when an institution must surrender artwork to a third-party after the institution has made collection management or other financial decisions having assumed that it received valid ownership of the work when it accepted the gift. Title insurance coverage for both the donor and the institution eliminates the conflict of interest which donors and institutions otherwise face when charitably gifted works have defective title: the museum must bear an uninsured cost of defending a claim that it cannot afford; yet acquiescing to a third-party claim may give rise to a claim from the donor that the acquiescence invalidated the tax benefits associated with making the gift and caused the donor this and other monetary loss.

Clients who face this complex challenge include museum trustees and officers, who, as part of a sea change in the property and D&O/E&O insurance arenas, now face the risk of personal liability for misuse of public or charitably gifted funds due to decisions premised on what turns out to have been a mistake about legal title.

Considering today's best-practices policies within the non-profit community to require title insurance for all charitable gifts of

real property (which carries a very low risk of exposure), the advent of title insurance for art (which carries a much higher risk of exposure) helps clients make or receive charitable gifts with full risk management. Clients facing these challenges also include bank trust officers who may transact art when managing trusts or foundations and when settling estates.

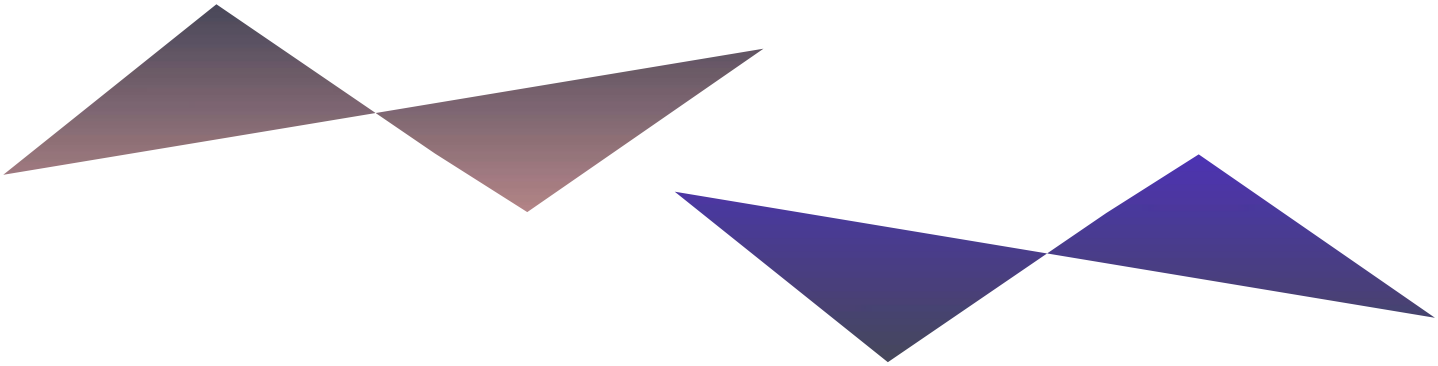
The dynamics for non-profit recipient institutions, charitable donors, and bank officers retained to execute trust and estate plans have ever-increasing importance considering that $180 trillion of global intergenerational wealth transfer is expected to take place over the next fifty years. Much of this transfer will occur in the form of art, which will eventually make its way to public institutions.

Art title insurance policy endorsements cover public relations expense for highly public parties. Policy endorsements can be added after coverage incepts in order to increase limits for works which have appreciated in value.

Art title insurance also provides clients with an important service. Art title claims are complex and require engaging top legal experts from each potentially dispositive area of the law to assess and defend a claim. Making this complex assessment is difficult for any one individual, versus an insurer which must constantly accumulate and analyze rapidly evolving market conduct and litigation information across a global industry. Multiple areas of law often intersect around art title disputes. As the complexities of the art title risk and the stakes around this new asset class increase, courts are only now at the horizon of grappling with inconsistencies among substantive areas of the law and among legal jurisdictions.

Lastly, art title insurance protects the advisor from a professional liability standpoint. The art market recognizes that there is no such thing as a perfect provenance and that all art transactions involve title risk. Auction houses most clearly demonstrate this knowledge by imposing a contractual right to rescind an auction transaction (without time limitation) in the event that questions concerning legal title of an auctioned work arise post-auction. The lack of permanency of auction transactions and the title risks inherent in private art transactions most insidiously impact charitable gifting and estate/tax plans surrounding art.

Art title insurance ultimately aids in removing artworks from the marketplace which have clear ownership flaws. It allows advisors and clients to focus on the clients' true goals for their art – whether cultural, philanthropic or investment.



UK IMMUNITY *[from page 1]*

The United Kingdom legislation adopts a middle way, or perhaps "semi-automatic" approach, in that it requires museums and galleries to obtain the status of 'approved institution' under the Act and to publish certain specified information about the object for which immunity is sought in advance of its entry into and exhibition in the United Kingdom.

Overview of the United Kingdom Legislation

Section 134 of the Act provides for the protection of any object under section 135 which is usually kept outside of the United Kingdom and not owned by a person or institution resident in the United Kingdom. In order to obtain protection, the object must be brought to the United Kingdom for public display in a temporary exhibition and the museum or gallery must first have complied with the requirements under the Draft Regulations (as to which see further below). Protection continues only for as long as the object is in the United Kingdom for public display (or for a limited number of incidental purposes) and for a maximum of 12 months from the date of entry of the object into the United Kingdom.

Pursuant to section 135 of the Act, a protected object may not be seized or forfeited under any enactment or rule of law. However, importantly, the immunity does not apply in circumstances where such seizure or forfeiture occurs by virtue of an order made by a court in the United Kingdom, and where the court was required to make that order under a European Community or international treaty obligation, or under a United Kingdom provision giving effect to such an obligation. The exception is intended to apply principally to the 1993 EU Directive on the Return of Unlawfully Removed Cultural Objects (and possibly, at some future date, to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict).

The process of obtaining coverage involves a museum or gallery making a one-off application for the status of 'approved institution'. The identity of the appropriate authority to which the application must be made depends on the part of the United Kingdom in which the applicant institution is located. The Secretary of State is competent to deal with applications by institutions located in England.

The principal objective of the application is for the applicant institution to demonstrate to the appropriate authority that it's due diligence procedures for establishing the provenance and ownership of art works meet recognised standards, and that the institution follows applicable guidance and principles. The Due Diligence Guidelines on combating illicit trade, for example, state that museums should borrow items only if they are legally and ethically sound and that they should reject an item if there is any suspicion about it, or the circumstances surrounding it, after undertaking due diligence.

Once the status of 'approved institution' has been obtained, in order to obtain protection for a specific object, the museum or gallery must then publish certain specified information on its website in accordance with the publication requirements detailed in the Draft Regulations. Since protection is not automatic, lenders must request the borrowing museum or gallery to seek immunity for the object concerned. Draft Regulation 2 requires such information to be published either two calendar months in advance of the opening of the exhibition or one calendar month before the object is brought into the United Kingdom. Pursuant to Draft Regulation 3, this includes information as to: (i) the identity, name and address of the lender; (ii) a description of the object (such as type, artist, title, dimensions, date of creation, a photograph of the object if created before 1946 and acquired by the lender after 1932, i.e., during the Nazi era, its appearance, any identifying marks or inscriptions, and, in the case of antiquities, the area where the object was found); (iii) details of the object's provenance (including the **[over]**

[*cont'd from previous page*] name of the person from whom the current owner acquired the object or, where not known, the circumstances in which the object was acquired and, specifically, a statement as to the objects history of ownership between 1933 and 1945); and (iv) the title of the exhibition, the address where it is to be held, and the period for which the object will be on display.

A copy of the information must also be sent to the Museums, Libraries and Archives Council, which serves as central depository of information.

More specific information must be disclosed to potential claimants pursuant to Draft Regulation 5 if the museum or gallery concludes that there is a 'plausible case', supported by at least some evidence, that there is a 'valid legal claim' to an object. In that case, the museum must, in addition to the information set out above, disclose a description in writing of the enquiries which it made into the provenance and ownership history of the object, as well as any information which it obtained as a result of those enquiries.

Where a query is raised about an object, this will not remove protection from seizure but will allow the borrowing institution to carry out further due diligence before taking a decision on whether to borrow and include that object in the proposed exhibition.

Some Legal and Practical Issues under the Spotlight

While objections of principle against the Act itself and the principles on which it is built may now largely be water under the bridge, it remains to be seen whether total immunity from seizure will withstand testing against Art 6 of the European Convention of Human Rights and national human rights legislation, in particular, where the claimant will not otherwise have access to an effective legal remedy in the place where the lender or the object are usually located.

The Act provides immunity from seizure ordered in criminal or civil proceedings and from seizure by law enforcement authorities. However, the effect of the protection is wider in that it deprives the legitimate claimant owner of a disputed object of the right to immediate possession, and thereby removes the basis for most actions in tort, such as a claim for conversion while the object is in the United Kingdom – and possibly thereafter. Not only claims for recovery but also claims for damages may therefore be stifled during the relevant period. It is therefore not strictly true to say that the Act operates only anti-seizure and not anti-suit.

Problems also arise from the use of the term 'owner' by the Act: if protection does not extend to objects owned by a person resident in the United Kingdom, then a claimant resident in the United Kingdom may well seek to argue that his true ownership of the object removes it from the scope of protection under the Act and that the question of ownership must be determined in the British courts.

The stated intention behind the disclosure requirements in the Draft Regulations is to provide potential claimants with sufficient information to identify the art work concerned without being unduly burdensome for the museum or gallery. However, while it is true that museums will already undertake due diligence to identify most of the information which the Draft Regulations identify (for example if they wish to obtain coverage under the Government Indemnity Scheme) the requirement for such detailed information to be published on a website may well give rise to security concerns for both lender and museum, as well as confidentiality and (potentially) tax concerns for lenders.

The circumstances under which the additional disclosure requirements in Draft Regulation 5 arise are open to interpretation and neither the term 'plausible case' nor the term 'valid legal claim' are defined in the Regulations. This may have a number of possible **[*over*]**

[UK IMMUNITY, *from previous page*] consequences: museums and galleries will certainly be reluctant to make any additional disclosure without first obtaining legal advice for fear of sparking off satellite litigation or, on the other hand, may be required to disclose the information in any event under freedom of information legislation if they are a public body. Problems may also arise where the information is either legally privileged or confidential to a third party, and where a legal claim may be contemplated against the disclosing museum itself rather than against the lender of the object. Lenders would be well advised to make any information which they provide to a museum about an object subject to written confidentiality obligations.

Conclusion

Where does the Act leave museums, lenders and claimants? Although the Act guarantees in principle that an object will be returned to the lender at the end of a temporary exhibition in the United Kingdom, the protection which the Act affords against seizure is by no means complete. There are furthermore a number of legal uncertainties surrounding the interpretation and application of the Act and of the Draft Regulations which mean that lenders will still have to draft and manage loan agreements very carefully.

The wide disclosure and publication requirements may well provide potential claimants with key information required to bring a subsequent action. Museums and galleries will have to ensure careful compliance with the statutory requirements for obtaining immunity for objects on loan and may nevertheless find themselves increasingly the subject of litigation. While the Act ensures that an object will be able to leave the UK and be returned to the lender even where adverse claim exists, the Act does not necessarily prevent claims against the lender and, indeed, the museum, once the object has left the jurisdiction, in particular, claims for damages.

HUMAN REMAINS RETURNED TO TASMANIA

By Patty Gerstenblith, DePaul University School of Law and Lucille A. Roussin

Britain's Natural History Museum returned the remains of seventeen Tasmanian aborigines. Australia's Tasmanian community had been fighting for about twenty years to recover the remains, which were taken in the 19th century. While the museum had agreed to the restitution in November 2006 upon recommendation of its Human Remains Advisory Panel, the museum also decided to conduct additional scientific tests before the restitution. The Tasmanian Aboriginal Centre decided to sue to prevent such testing, but a settlement was mediated by which the museum could conduct additional but non-invasive scientific tests, such as measurements, scans and the making of casts, but DNA and other invasive analyses were not allowed. This and anticipated claims for return of human remains held at Cambridge University, Oxford University and the National Museums Scotland are expected to follow the Department of Culture, Media and Sports' Guidance for the Care of Human Remains in Museums, which calls for a balancing of scientific interests against the interests of descendant communities.

This article is also part of the Committee's 2007 Year in Review

ODYSSEY MARINE RECOVERS COINS & ARTIFACTS FROM COLONIAL SHIPWRECK

By Patty Gerstenblith and Lucille A. Roussin

Odyssey Marine Exploration, Inc., a company engaged in deep-water exploration of historic wrecks and recovery of artifacts for commercial sale, announced the recovery of over 500,000 silver and gold coins and other artifacts from a Colonial era shipwreck code-named "Black Swan." Odyssey claims that the wreck is not yet identified and refuses to disclose its exact location; the wreck is described as located one miles west of the Straits of Gibralter in international waters beyond the territorial waters or contiguous zone of any nation and at a depth of 1100 meters. The discovery was announced after Odyssey had imported the artifacts into the United States; the artifacts are being cleaned and conserved and will then be offered for sale.

Odyssey has filed three admiralty claims (or arrests) for wrecks located in the Atlantic Ocean and in the western Mediterranean in federal court in the Middle District of Florida. Spain has entered all three as a claimant, asserting ownership of any Spanish property that might be located at these sites. In addition, Spain is seeking to dismiss Odyssey's filings because it had not described the defendant res (the shipwrecks) with sufficient detail.

This article is also part of the Committee's 2007 Year in Review

IRAN EMBROILED IN MULTIPLE DISPUTES REGARDING CULTURAL PATRIMONY

By Patty Gerstenblith, Depaul University School of Law

Three different controversies concerning Iranian artifacts have continued this year. Two have taken place in British courts and the third in courts in the United States.

Iran v. Berend

The first case involved questions of acquisition of movable property and choice of law. A French collector, Denyse Berend, placed for auction at Christie's in London a fragment of an Achaemenid limestone relief, taken from the eastern staircase of the Apadana structure (or audience hall) of Persepolis, dating to the first half of the fifth century B.C. Berend purchased the relief at a public auction in New York in 1974 and took possession of it in Paris, also in 1974. When Berend transferred the relief to London, Iran sued and received a temporary injunction restraining the sale. While both parties agreed that Iran had good title to the relief before 1974, the court held that the question of title should be decided according to the *lex situs* where the title that is now in dispute (Paris) was purported to have been acquired.

Iran first tried to argue that under French conflict of laws, a French court would apply the doctrine of *renvoi*, thereby utilizing the law of Iran (the country of origin) to resolve the title dispute. The British court held, however, that there was no compelling or overarching doctrinal basis for applying *renvoi* to movable **[*over*]**

[IRAN LITIGATION, *from previous page*] property under the facts of this case. The court then turned to the resolution of the dispute under French domestic law. According to French law, a possessor may acquire title either by possession for three years in good faith under article 2279 of the Civil Code (acquisition of title by possession) or by possession that is continuous, uninterrupted, peaceful, public and unequivocal (Art. 2229) for thirty years under article 2263 of the Civil Code (acquisition of title by 30 year prescription). In this case, both parties conceded that the possessor had acted in good faith. The current possessor was therefore allowed to maintain her title to the relief. It sold at auction in October for £580,500.

Iran v. Barakat

The second case involved the application of Iran's national ownership law of antiquities to determine the disposition of a cache of antiquities imported into England by a dealer, Barakat. The antiquities at issue include jars, bowls and cups made of chlorite that allegedly were excavated illegally in the Jiroft region of southeastern Iran and date to the third millennium B.C. The sites in the Jiroft region were excavated only in recent years but had been subjected to looting for several years before. Iran based its claim of title to the antiquities on its laws pertaining to antiquities.

The trial court first examined various laws of Iran that pertain to its archaeological heritage, in particular the laws of 1930 and 1979. In examining these laws, however, the court concluded that none made a clear statement of ownership, vesting title to undiscovered antiquities in the nation. The court then turned to the question of whether Iran has a right to possession of the antiquities, so that the defendant had committed conversion or the tort of wrongful interference with goods. For such the claim to succeed on the basis of a right to possession, Iran had to demonstrate that it both a proprietary right and an immediate right to possession. While the court agreed that Iran had an immediate right to possession, because of a requirement that accidentally discovered antiquities had to be submitted to the state, Iran's right was not proprietary, as indicated by the court's earlier discussion of the failure of the law to clearly vest title in the nation.

Although Iran had failed to prove its ownership interest in the antiquities, the court turned to consider, in obiter dictum, the question of whether, even if Iran's law were clearly a vesting law, its ownership claim could be vindicated. The court cast this issue in terms of the justiciability of Iran's claim. Public laws of one nation, such as penal and revenue laws, are not enforceable in another state. On the other hand, the court conceded that a nation could assert its ownership rights to property located in another state. However, the court seemed to limit enforceable ownership rights to those acquired by means by which private individuals could acquire ownership, such as by purchase, gift and inheritance. Because acquisition by means of a national ownership law is a method available only to sovereigns, the court therefore characterized such laws as public in nature and held that Iran's claim was not justiciable. The appeal in the case was heard in October. The case was reversed just as this Newsletter was being completed. A more detailed discussion of the appellate decision will appear in the next issue of the Newsletter.

Iranian Antiquities in U.S. Collections

The victims of a bombing carried out by the Palestinian terrorist organization Hamas in Jerusalem in 1997 were awarded damages against Iran as a state sponsor of Hamas. The plaintiffs then sought to attach antiquities that allegedly belong to Iran and are currently in the possession of several U.S. institutions, including the Oriental Institute of the University of Chicago, the Field Museum of Natural History, the Boston Museum of Fine Arts and Harvard University. There has been relatively little reported progress this year in these suits. **[*over*]**

[IRAN LITIGATION, *from previous page*]

In the suit against the Oriental Institute, approximately 30,000 ancient cuneiform texts on loan, comprising primarily two collections, the Persepolis Fortification texts and texts from the site of Chogha Mish, are at issue. The Oriental Institute concedes that these are on loan from Iran and therefore are the property of Iran. It relies on the Foreign Sovereign Immunity Act ("FSIA") as the basis for its defense against attachment of the artifacts. On the other hand, the plaintiffs claim that the artifacts are subject to attachment under the FSIA's exception for "property … used for a commercial activity". At the initiation of the attachment proceeding, the magistrate judge held that commercial use is determined by the activities of the foreign sovereign (Iran) and not by the U.S. possessor of the assets at issue.

In the most recent developments in the Chicago case, Iran filed a motion for partial summary judgment and, in response, the plaintiffs filed a motion for additional discovery. The court granted the plaintiffs' request for additional discovery. The plaintiffs argued that they need additional discovery to determine whether the Oriental Institute was acting as Iran's agent so that any commercial activity conducted by the Oriental Institute could be attributed to Iran. In addition, the plaintiffs claimed that the antiquities are "blocked" assets of Iran and can therefore be attached under the Terrorist Risk Insurance Act. In support of that argument, the plaintiffs are seeking to determine whether the Oriental Institute received an attorney opinion concerning the ownership of the artifacts. The plaintiffs are also seeking pleadings from two other cases involving Iranian artifacts. One of these cases is the proceeding before the Iran-United States Claims Tribunal in which the United States may have contested Iran's ownership of the Chogha Mish collection. The second proceeding is Iran's claim for replevin against a dealer in London for the restitution of artifacts allegedly looted from the Jiroft area of Iran.

A different version of this article is also part of the Committee's 2007 Year in Review. A more comprehensive update on the impact of the Barakat case in the United Kingdom will be published in our next issue.

Bonnie Czegledi

Millar Kelley

[**ITALY'S CULTURAL PATRIMONY,** ***cont'd from page 2***] In the agreement, the Italian Culture Ministry agreed that the Cult Goddess could remain on display at the Getty until 2010, but the other artifacts were to be returned immediately. Italy will loan other artifacts and engage in "cultural cooperation," including research projects and joint exhibitions.

In the midst of the negotiations in August, Italy dropped the civil charges against True and reduced the criminal charges, but the criminal trial of True and Hecht continues. Additionally, the Greek government charged True with antiquities smuggling, and the Getty returned four objects to Greece, including the prized gold funeral wreath, a photo of which used to grace the cover of the Getty's brochure. A Greek judge dismissed the criminal charges against True, which pertained solely to the gold funeral wreath, in late November on statute of limitations grounds.

True vigorously maintains her innocence, claiming that she never knew any of the antiquities in question were looted. In late December 2006 in the midst of the negotiations, in a two-page letter she wrote to her former colleagues at the Getty, she railed against their "calculated silence" and "lack of courage and integrity." She wrote specifically in regard to the return of the gold funerary wreath and other objects to Greece:

"Once again you have chosen to announce the return of objects that are directly related to criminal charges filed against me by a foreign government . . . without a word of support for me, without any explanation of my role in the institution, and without any reference to my innocence."

Many curators of U.S. museums have publicly supported True; others have distanced themselves.

Meanwhile, the Italian government on February 21, 2006, finalized negotiations with the Metropolitan Museum of Art for the return of the prized Euphronios krater, other vases and Hellenistic silver. The Boston Museum of Fine Arts in September 2006 agreed to return thirteen objects, including a statue of Sabina. On October 26, 2007, the Princeton University Art Museum agreed to return four objects immediately and four more in four years.

No museum acknowledged any wrongdoing; all received promises for future loans of Italian antiquities or other "cultural cooperation." Not all objects initially demanded by Italy were returned.

The Italians reportedly have since turned their sights on to other museums, dealers and collections implicated in the photo chain linking tomboroli looting to museums.

New York art dealer Jerome Eisenberg of Royal Athena Galleries agreed to return eight Etruscan and Roman artifacts on November 6, 2007.

Other major players in the international antiquities market reportedly targeted by Italy but not yet having reached agreement include the Cleveland Museum of Art, Toledo Museum of Art, Minneapolis Institute of Arts, Miho Museum (Japan), the Barbara and Lawrence Fleishman collection, the Shelby White and Leon Levy collection, the Maurice Tempelsman collection, dealer Robin Symes (UK), dealer Fritz Bürki (Switzerland), Galerie Nefer (Switzerland, owned by Frida Tchacos, wife of Werner Nussberger who donated two items to the Getty) and Atlantis Antiquities.